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No. 10-869

Supreme Court, U.S.
FILED
MAR 17 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DAVID ROLAND HINKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

DENNIS P. RIORDAN
**Counsel of Record*
DONALD M. HORGAN
TED SAMPSELL-JONES
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
(415) 431-3472
(415) 552-2703 (fax)
dennis@riordan-horgan.com

Attorneys for Petitioner David Roland Hinkson

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF AUTHORITIES

Page

CASES

Brady v. Maryland, 373 U.S. 83 (1963) 7

Crane v. Kentucky, 476 U.S. 683 (1986).....2, 3

Davis v. Alaska, 415 U.S. 308 (1974).....4

Giglio v. United States, 405 U.S. 150 (1972) 7

Henderson ex rel. Henderson v. Shinseki, ___ U.S. ___, 131 S. Ct. 1197 (March 1, 2011).....5

Olden v. Kentucky, 488 U.S. 227 (1988).....3

Porter v. McCollum, ___ U.S. ___, 130 S. Ct. 447 (2009).....4

United States v. Bagley, 473 U.S. 667 (1985) 7

United States v. Hinkson, 611 F.3d 1098 (9th Cir. 2010).....2, 6, 8

United States v. Kohring, ___ F.3d ___, 2011 WL 833263 (9th Cir. 2011).....7

United States v. Oregon, 366 U.S. 643 (1961).....5

United States v. Stevens, Criminal Case No. 08-231 (D.D.C.).....7

Washington v. Texas, 388 U.S. 14 (1967) 2, 3

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The government asserts petitioner Hinkson has claimed nothing more than that "the district court abused its discretion in excluding documentary evidence concerning Swisher's military record, [a] fact-bound decision [that] is correct and does not conflict with any decision of this court or any other court of appeals, [and which] does not raise a legal question of general application. . . ." (Govt. Opp., at 13) The government further contends that petitioner "suggests neither that the court of appeals misinterpreted the law nor that its application of the law to the unique facts of this case is likely to have a substantial impact on future cases." (*Id.*)

To the contrary, Hinkson argued both to the Court of Appeals and here that (a) under this Court's precedents, he was entitled as a matter of constitutional and statutory right to introduce documentary evidence conclusively proving that Eldon Swisher, the government's chief witness against him, mounted the witness stand intending to commit perjury and to proffer forged documents on an issue critical to the government's case; and (b) the en banc opinion, left undisturbed, will indeed "have a substantial impact on future cases."

2. The pivotal issue on the counts of conviction was the credibility of Swisher's uncorroborated testimony that he had been solicited to commit murder by Hinkson. Unless jurors were convinced beyond a

reasonable doubt that Swisher could be trusted to tell the truth, they would be required to acquit, because "[w]ithout Swisher, the government had no case." *United States v. Hinkson*, 611 F.3d 1098, 1099 (9th Cir. 2010) (Kozinski, J., dissenting)

It is undisputed that Swisher committed a federal crime of moral turpitude by appearing in court wearing a phony Purple Heart commendation; that he lied under oath when he testified that, as the government asserted in its opening statement, he had served in combat; and that he tendered forged documents to the trial court and jury attesting to other prestigious military commendations he had never earned. (*See* Govt. Opp., at 8-9, n.2)

Yet the en banc majority below held, and the government here asserts, that the issue of whether Swisher had lied to the jury and committed a fraud on the court was "tangential" and "unrelated to the factual issues to be resolved by the jury." (*Id.*, at 16, citing Pet. App., at 129, 133) Plainly, this ruling is far more than a "fact-bound" application of the abuse of discretion standard, as it eviscerates the right of a criminal defendant to challenge the credibility of the prosecution's core evidence, as recognized in cases such as *Washington v. Texas*, 388 U.S. 14, 19 (1967) and *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986).

3. The government contends that this Court should not reach the issue of whether Hinkson "had a constitutional right to offer the documents into evidence" that would have exposed Swisher's perjury,

because, although that constitutional claim was the centerpiece of Hinkson's Ninth Circuit briefing, the en banc majority below did not address it in its opinion. (Govt. Opp., at 16) But an opinion that ignores this Court's constitutional jurisprudence conflicts with, and misinterprets, that law by omission. Indeed, it is the very failure of the en banc majority to consider this Court's precedents in *Washington*, *Crane*, *Olden v. Kentucky*, 488 U.S. 227 (1988), and others that renders the opinion so pernicious in terms of its "impact on future cases." The teaching of the opinion below is that, in deciding whether the defense may gain admission of evidence which fundamentally undermines the credibility of the prosecution's core evidence, a trial court need not take account of a defendant's rights under the Fifth, Sixth, and Fourteenth Amendments, as interpreted by this Court.

4. The government acknowledges that petitioner has consistently argued through the course of this appeal that the excluded documents would have proven Swisher's bias and interest in his testimony against petitioner, but claims that "petitioner does not explain how Swisher's military record would demonstrate bias or self-interest with respect to petitioner's prosecution." (Govt. Opp., at 15). The excluded military records would have indisputably established that Swisher, as the government now concedes, had used the forged documents he tendered in court to fraudulently obtain veterans benefits to which he was not entitled, a federal offense that was continuing at the time Swisher testified against petitioner. This

Court has held that a defendant has a constitutional right to prove that a government witness is vulnerable to prosecution, as Swisher plainly was, because the witness's "fear or concern for possible jeopardy" creates a bias and interest in testifying for the prosecution. *Davis v. Alaska*, 415 U.S. 308, 311 (1974) (cited in Govt. Opp., at 18 n.6)

5. The government correctly notes that the petitioner contends that "the exclusion of Swisher's military record takes on constitutional dimension because the jury's view of Swisher would have changed dramatically had the evidence been allowed." (Govt. Opp., at 18) Both the en banc majority opinion and the district court ruled to the contrary, holding that the excluded evidence exposing Swisher as a military fraud had "limited probative value" in impeaching his credibility. 585 F.3d at 1267 (App. 133, 134). In their view, had jurors at Hinkson's trial learned Swisher was a military fraud, they would still have accepted his uncorroborated testimony that Hinkson made him a serious offer to pay for the murder of federal officials.

In his petition, petitioner contended that assessment of petitioner's jury was so patently unreasonable as to be an error as a matter of law. *See Porter v. McCollum*, ___ U.S. ___, 130 S. Ct. 447 (2009) (State courts had acted unreasonably in discounting the impact that evidence of a defendant's "heroic military service" in combat in the Korean War would have had on a penalty phase jury in a capital case) Since the filing of Hinkson's petition for a writ of certiorari, this

Court decided another case which exposes the en banc majority's fundamental misunderstanding of the esteem with which veterans in general, and combat veterans in particular, are held in our society.

The issue in *Henderson ex rel. Henderson v. Shinseki*, ___ U.S. ___, 131 S. Ct. 1197 (March 1, 2011) was whether a time limit for appeals of denials of claims for service-related disability benefits found in the Veterans' Judicial Review Act (VJRA) was jurisdictional, or whether a failure to meet that deadline could be forgiven for equitable reasons. In reversing an administrative decision that the limit was jurisdictional, this Court took note of "Congress' longstanding solicitude for veterans, *United States v. Oregon*, 366 U.S. 643, 647 . . . (1961)," which is "plainly reflected in the VJRA and in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Shinseki*, 131 S. Ct. at 1199.

As is true of Congress, American jurors would certainly place a "thumb on the scale" in favor of the credibility any witness they believed to be a combat veteran. Conversely, they would come down with a heavy fist on the other end of that scale if they were to learn that a witness such as Swisher had both lied to them and stolen veterans' benefits by falsely claiming he had been wounded in combat.

6. The government claims that the jury must be "presumed not to have attached any weight (in assessing Swisher's credibility or otherwise) to testimony

about Swisher's military record that it was instructed to disregard . . . " (Govt. Opp., at 19-20) But "the prosecutor described Swisher in his opening statement as a 'Combat Veteran from Korea during the Korean Conflict' who 'was not averse to . . . violent, dangerous activity,' and stated in his closing argument that Hinkson 'understood' that Swisher 'had served in combat and killed people.'" 611 F.3d at 1132 (W. Fletcher, J., dissenting from the denial of rehearing en banc) (App. 88). The jury was never told by the government that, contrary to its position in opening argument, Swisher had never served in combat, nor that the Purple Heart he wore into court was a fraud, although the government was well aware of that fact by the time of its closing argument. It cannot be presumed that jurors divined Swisher's mendacity when the government went to great length to hide his lies from them, and succeeded in that object.

7. Petitioner has argued that even under a simple abuse of discretion standard, the district court's exclusion of the documents which exposed Swisher's perjury and fraud requires reversal, for it rested on fundamental error of law: the trial court's ruling that the subject of Swisher's falsehoods was "collateral," rendering the impeachment evidence inadmissible under Federal Rule of Evidence 608(b). Neither the en banc majority nor the government attempted to defend that ruling (*see* Govt. Opp., at 14), because it is indefensible.

8. Finally, the en banc ruling would likely lead to a repeat of the sort of *Brady-Giglio*[1] scandals in which the Department of Justice has been recently implicated. In *United States v. Stevens*, Criminal Case No. 08-231 (D.D.C.), the government's prosecution of Alaska Senator Ted Stevens collapsed when it was revealed that the government had suppressed evidence tending to impeach the credibility of its chief witness, Bill Allen. Just last week, a panel of the Ninth Circuit reversed the conviction of another Alaska political figure who also had been prosecuted chiefly on the basis of Allen's testimony, *United States v. Kohring*, ___ F.3d ___, 2011 WL 833263 (9th Cir. 2011). The evidence concerning Allen tended to prove that he had attempted to suborn perjury in another case. The evidence exposing Swisher's perjury in this case was certainly no less powerful impeachment than that at issue in *Stevens* and *Kohring*.

The governmental suppression of evidence favorable to the defense constitutes a *Brady* violation only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Here, the government's chief witness concocted a plan to commit perjury and tender false documents in court, yet the en banc majority deemed such conduct to be

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

"tangential" and "unrelated to the factual issues to be resolved by the jury." Under that logic, prosecutors in the future who learn that a government witness intends to perjure him or herself on the witness stand are free to keep that information to themselves on the ground that, under *Hinkson*, such devastating impeachment evidence is not "material." That danger alone is sufficient reason to grant certiorari and vacate the en banc majority opinion.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted and the matter set down for full briefing, or the judgment of the Ninth Circuit should be summarily reversed and the matter remanded for a new trial.

Dated: March 17, 2011

Respectfully submitted,

DENNIS P. RIORDAN
**Counsel of Record*
DONALD M. HORGAN
TED SAMPSELL-JONES
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
(415) 431-3472
(415) 552-2703 (fax)
dennis@riordan-horgan.com

Attorneys for Petitioner
David Roland Hinkson